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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re of Applications of AMERITECH CORP., Transferor, and SBC COMMUNICATIONS, INC., Transferee for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules	)	CC Docket No. 98-141

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

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Transferee	)	
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95 and 101 of the Commission's	)	
Rules	)	

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby petitions the Commission to deny the above-captioned application of SBC Communications and Ameritech Corporation.[1] The proposed transaction is contrary to the public interest and should be disapproved.

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1 Merger of SBC Communications and Ameritech Corp., Description of the Transaction, Public Interest Showing and Related Demonstrations (July 24, 1998). ("Application" or "Description"). The Application was placed on Public Notice on July 30, 1998, Public Notice DA 98-1492. Pursuant to a request filed by numerous consumer groups, an extension of time was granted for Petitions/Comments until October 15, 1998. *Order,* DA 98-1765 (CCB, PPP Div. Sept. 1, 1998).

I. INTRODUCTION AND SUMMARY

The proposed merger will substantially lessen both actual and potential competition in numerous jurisdictional markets, and harm consumers of these services.[2] The Commission cannot find that approval would serve the public interest; it thus must deny the Application.

First, the merger will preclude competition between the parties in specific local exchange markets. Although the application attempts to minimize Ameritech's planned entry into SBC's markets prior to the merger, the public record shows that Ameritech would have provided direct and significant competition in SBC's territory but for the merger.

Second, and on a much greater scale, the merger threatens to perpetuate monopoly control over local telecommunications facilities and services. These facilities and services are essential inputs for the downstream markets for local, long distance and new services. While these two RBOCs each have substantial incentive and ability to raise rivals' costs even before the merger, the increase in local markets controlled by the merged entity will in turn increase these incentives and abilities. As explained in full by Drs. Katz and Salop, "Using a Big Footprint to Step on Competition: Exclusionary Behavior and the SBC-Ameritech Merger," October 14, 1998, Attachment B, ("Katz

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2 An overview of the economic analyses supporting these conclusions is provided in Attachment A, Dr. Stanley M. Besen, Dr. Padmanabhan Srinagesh and Dr. John R. Woodbury, "Economic Analysis of the SBC/Ameritech Merger," October 14, 1998 ("Besen, Srinagesh and Woodbury").

and Salop Dec.") the merger would allow the merged firm to internalize certain spillover effects from exclusionary conduct, thereby making such conduct more profitable and increasing the *incentive* to discriminate. Moreover, the merger would increase the coordination of currently separate local exchange operations thereby increasing the *ability* to discriminate.

Third, the merger will diminish the effectiveness of regulation by reducing the number of available benchmarks. Benchmarking has become a very valuable regulatory tool to this Commission since the Bell System divestiture, as explained by Dr. Joseph Farrell and Dr. Bridger Mitchell in their paper, "Benchmarking and the Effects of ILEC Mergers," October 14, 1998, Attachment C. By decreasing the number of benchmarks, the merger would make discrimination and other exclusionary conduct less discernible and thus more likely to occur.

Fourth, the merger would also have anticompetitive effects in the video distribution markets and raises substantial questions of lawfulness under section 652. The Application is noticeably (and uncharacteristically) circumspect on the merged firm's plans for video, notwithstanding Ameritech's near unique overbuild strategy.

Fifth, the claim that the merger will prompt the merged parties to enter 30 out-of-region markets is neither credible nor enforceable, and it cannot in any event compensate for the anticompetitive effects of the merger. As analyzed in the Besen, Srinagesh and Woodbury paper, the strategy has not been shown to be merger-specific nor likely to result in lower prices. By its terms, the strategy requires section 271 authority throughout the SBC and Ameritech states and thus cannot be implemented within the asserted time frame.[3] Finally, even if accepted at face value, the strategy to 'jump-start' competition out-of-region cannot as a matter of law or policy override the anticompetitive effects of the merger in-region.

Sprint also examined other efficiencies claimed by the applicants; these too are not supported nor are they sufficient to overcome the anticompetitive effects of the merger.

Sprint urges the Commission to put a halt to the dramatic consolidation proposed for the local telecommunications industry. At a time when the industry still comprised several distinct large ILECs, post-merger conditions were relied upon to diminish the adverse competitive effects. Given the instant proposal, however, the Commission must consider the substantial evidence showing that post-merger conditions have been ineffective and thus do not serve as an adequate alternative solution.

II. The Merger Will Preclude Competition between the Parties in Local Exchange Markets.

The merger should be disallowed because it will eliminate actual and potential competition from which consumers would benefit but for the merger. SBC and Ameritech are likely potential entrants into each other's local markets; this significant source of competition that would help fulfill the

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3 The monopoly control enjoyed by the two applicants in their respective regions is analyzed in the attached Declaration of Dr. John B. Hayes, "Market Power and the SBC-Ameritech Merger," October 15, 1998, Attachment D ("Hayes").

policy objectives of the 1996 Act should not be allowed to be eliminated through merger.

Using the analysis found in Applications of NYNEX Corporation and Bell Atlantic Corporation, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, FCC File No. NSD-L-96-10, *Memorandum Opinion and Order,* 12 FCC Rcd 19985 (1997) ("*Bell Atlantic-NYNEX*"), the FCC should consider the effects of the proposed acquisition on the provision of local exchange and local exchange access in specific geographic areas, as well as throughout the local markets found in the existing service territories of SBC and Ameritech. Under the actual potential competition doctrine, a merger between two firms may be found unlawful where the merger eliminates the "possibility of entry in a more procompetitive manner." DOJ Merger Guidelines § 4.112. These effects are likely to be found where the relevant market is highly concentrated, entry barriers are substantial, and the merging firm is one of "a few firms that have the same or comparable advantage in entering" the market. DOJ Merger Guidelines § 4.133. While subjective evidence of intent to enter is unnecessary to find a firm to be a likely entrant into the market,[4] both objective and subjective evidence indicating likely entry are probative.[5]

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4 See, e.g., United States v. Falstaff Brewing Corp., 410 U.S. 526, 545 (1973) (Marshall, J. concurring); Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1270 (5th Cir. 1981).

5 Subjective evidence that the firm would not have entered is in fact discounted as "it may be motivated by a wish to

The Commission has already ruled that its own analysis of the potential competitive effects of a proposed merger under the public interest standard is not rigorously tied to a specific number of other possible entrants. The Commission has reasoned that, especially in light of the highly concentrated and evolving nature of local telecommunications markets,[6] it is not bound by the set number in the Guidelines developed for stable markets. An examination of these factors warrants the conclusion that the merger will have adverse competitive effects in the markets for local exchange and exchange access in numerous local markets throughout the service territories of SBC and Ameritech.

Local exchange and exchange access services have been repeatedly found by the FCC to constitute discrete relevant economic markets. See, e.g., *Bell Atlantic-NYNEX,* at ¶ 51. The Commission also identified relevant submarkets formed by clusters of consumers with similar demand patterns. These included large businesses/government users, medium-sized businesses, and residential/small business users (mass-market). Competition for these services was found to occur within a specific LATA as well as in a broader relevant market comprising a metropolitan area.

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influence the merger litigation." See Areeda & Hovenkamp, V Antitrust Law ¶ 1121b2 (1980).

6 "In telecommunications markets that are virtual monopolies or that are not yet developed, however, the loss of even one significant market participant can adversely affect the development of competition and the attendant proposals for deregulation." *Bell Atlantic-NYNEX,* at ¶ 66, citing Areeda & Hovenkamp, 3 Antitrust Law (rev.ed. 1996) ¶170d ("merger with a potential competitor acquires special significance when one of the firms is a monopolist.").

The Commission also considered, but found unnecessary to analyze, additional geographic areas in which the economic effects of the merger could be measured.

These relevant markets (and submarkets) are unquestionably concentrated, with SBC and Ameritech operating telephone companies enjoying virtual monopolies for these services. See generally, Hayes (*passim*). Even as shown in the Application, competitive entry has been minimal at best. This conclusion does not warrant extensive fact gathering; it is a matter subject to official notice within the Commission's administrative expertise. Notwithstanding the Application's mischaracterizations of these markets, one need only consider the fact that not one of the states involved has approved a finding that SBC or Ameritech is facing sufficient competitive entry under Track A of Section 271 -- a standard which itself falls short of a finding that the markets are robustly competitive. In fact, several of the relevant states have advised these RBOCs that they must undertake significantly substantial additional steps to open their markets before a section 271 application could be approved.[7]

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7 See Pacific Bell and Pacific Bell Communications Notice of Intent to File Section 271 Application for InterLATA Authority in California, U 1001 C, *California PUC Telecommunications Division Final Staff Report* (Oct. 5, 1998); Application of Southwestern Bell Telephone Company Seeking Verification That It Has Fully Complied With And Satisfied The Requirements of SEC. 271(C) Of The Telecommunications Act of 1996, Dkt. No. 98-048-U, *Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 U.S.C. § 271(d)(2)(B)* (1998) (finding numerous issues of non-compliance, including *inter alia* that SWBT's

Further, these markets are characterized by high entry barriers. As the Commission observed in *Bell Atlantic-NYNEX*, the RBOCs' failings to agree to and implement effective interconnection arrangements has significantly slowed the removal of entry barriers which the 1996 Act had set as a principal Congressional goal. The added legal uncertainties created by the litigiousness of SBC, Ameritech and others mean that the FCC's ability to set right these difficulties remains in limbo.

There is also substantial objective evidence that SBC and Ameritech can each be considered one of a small number of likely entrants into each other's local markets. These carriers have advantages in entering local markets that are unavailable to virtually all other potential entrants. These advantages include experience in providing local services, including expertise in established complex systems to handle administrative capabilities (billing, order taking, customer care, etc.) not enjoyed by such other possible entrants as cable companies or CAPs. SBC and

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provisioning of UNEs is so untimely as to preclude CLEC compliance with state quality standards, and that there are serious malfunctions in SWBT's provisioning of 911 service); Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market, PUC Project No. 16251 (Tex. PUC 1998)(stating that it cannot find that SWBT is compliant, and ordering further collaborative process, to address dozens of issues raised in the order). Although no written order has been released to date, the Kansas Corporation Commission has similarly refused to accept SBC's conduct as a basis for an application under Section 271, relying upon a staff recommendation which identified numerous deficiencies in SWBT's 271 filing. See "Kansas Declines to Back SWBT's InterLATA Plans", Telecommunications Reports at 11 (Aug. 31, 1998).

Ameritech also serve adjacent areas in Illinois and Missouri, enabling either of them to deploy in-region switches, transport facilities, and rights-of-way to serve out-of-region contiguous areas. Their adjacent operations, coupled with existing out-of-region businesses such as security monitoring and cellular also aid in consumer brand recognition out-of-region.[8]

In the context of the SBC-Pacific Telesis merger, SBC's witness Richard J. Gilbert explained the company's out-of-region strategy at least at that time:

> SBC's corporate strategy is to allocate its resources to enter new geographic or product areas only where it has some combination of the following existing assets: (1) network infrastructure, (2) an existing customer base, and (3) brand-name recognition.[9]

The RBOCs also enjoy substantial advantages in negotiating interconnection agreements with other ILECs, since they have better access to information regarding the local operations of their sister RBOCs than other possible entrants. Typically, CLECs trying to negotiate with ILECs have a significant disadvantage because of the asymmetry in information available to

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8 These factors distinguish the FCC's finding in SBC-PacTel, where "the two merging companies' territories were not adjacent (and certainly without a major center of population and telecommunications at their border); neither company had assets, customers or a recognized brand name in the other's territory; and there was no realistic suggestion that either one had ever considered entering the other's markets for local exchange service." *Bell Atlantic-NYNEX,* at ¶ 69.

9 Report of Richard J. Gilbert, "*Response to Opponents' Comments Concerning the Proposed Pacific Telesis - SBC Merger*," at 7 (Aug. 7, 1996) (citations omitted) (attached to Joint Opposition of SBC Communications Inc. and Pacific Telesis Group to Petitions to Deny and Reply to Comments, (filed in FCC Report No. LB-96-32, Aug. 9, 1996).

each side in understanding such issues as technical feasibility, the costs of providing interconnection, new means of interconnecting, etc. Another RBOC is far better able to assess and contest claims by an ILEC that one form of interconnection is not feasible or too costly, and thus the product of these negotiations can be expected to produce more efficient arrangements for competitive entry. The consequences of this, given section 252(i)'s most favored nations obligations, are to improve interconnection for other CLECs and bring about competitive entry that much more efficiently and quickly.[10]

The Application's assertions notwithstanding, SBC and Ameritech are in a very small if not unique set of likely entrants. In *Bell Atlantic-NYNEX*, the Commission found that other entrants, such as wireless carriers, cable companies and CAPs, are not as significant as the RBOCs. The applicants have not put forth any persuasive case here to the contrary. And while the Commission found MCI, AT&T and Sprint to be among the most significant likely entrants, the advantages enjoyed by the merging parties in entering each other's markets make the large long distance carriers run 'second' by a considerable margin among the most significant entrants.

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10 Thus, while independent entry can be presumed to have pro-competitive effects, there is specific proof to this effect here. See Areeda & Hovenkamp, 1997 Supplement at ¶ 1121d (citing BOC Int'l v. F.T.C., 557 F.2d 24, 27 (2d Cir. 1977) ("typically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant pro-competitive effects.").

This evidence standing alone indicates substantial anticompetitive effects of the merger because it would eliminate this potential competition. In addition, the public record reflects specific evidence establishing actual and planned entry by Ameritech into local markets served by SBC in Missouri, California and Texas.

Although Sprint has not had access to the parties' internal documents that may shed additional light on their pre-merger plans to enter each other's markets, information available from public sources alone readily establishes that such plans were already operative. In May of 1996, Ameritech began pressing its case to enter SBC's local markets in Missouri. Contrary to the application's *post hoc* characterizations, Ameritech's entry in Missouri reflected a substantial commercial initiative. After its initial filing with the Missouri PSC, Ameritech amended its application on August 19, 1996. Ameritech sought authority to compete in the provision of local exchange and access services in specified exchanges throughout the state, identifying all exchanges served by SWBT, United and GTE as planned areas of entry. It also stated that it would in the future seek authority for the remainder of the state. The scope of the authority sought by Ameritech included not only resale but also facilities-based provision of local services. After hearings and entry of a stipulation and agreement by all parties to the proceeding,[11]

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11 The proceeding consolidated numerous CLEC applications.

the application was granted by the Missouri PSC on February 28, 1997.

Ameritech pursued and successfully negotiated a comprehensive interconnection agreement with SBC that was signed on July 17, 1997 and filed with the Missouri PSC on August 12, 1997. That agreement was in no way limited to resale; its introductory language recites plainly that the purpose of the contract is to establish terms "for the resale of SWBT services and for the provision by SWBT of Interconnection, Unbundled Network Elements, and ancillary functions ...." Interconnection Agreement at 1. The contract, which runs more than six hundred pages, is comprehensive. It includes numerous and detailed provisions that extend well beyond resale, including the leasing of UNEs, reciprocal compensation, number portability, access to poles, conduits and rights-of-way, etc. After an earlier failed attempt to file a tariff for the provision of its services in competition with SBC, Ameritech refiled on November 5, 1997. The tariff reflected service offerings to residential customers on a resale basis in competition with SBC in 40 exchanges covering the St. Louis and Cape Girardeau areas. The Staff's Recommendation to the full Commission to approve the tariff filing noted Ameritech's representations to the PSC with regard to its provision of services.[12] The Recommendation specifically recited

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12 Application of Ameritech Communications International, for a Certificate of Local Exchange Service Authority to Provide and/or Resell Basic Local Telecommunications Service and Local Exchange Telecommunications Service, Case No. TA-96-415, *Staff's Recommendation to Approve Basic Local Exchange Tariff* (Mo.PSC Nov. 19, 1997).

that although the initial offering would entail resale only, "Ameritech does plan on offering facilities-based local service in the near future." Id. at 1. It further described Ameritech officials' statements that it was "important to the company to begin serving customers as soon as possible and in order to accomplish that, Ameritech filed this tariff with minimal service offerings in an effort to expedite the tariff approval process." Further, the state staff reported that Ameritech had represented to the PSC that after it "established a base of residential customers, it plans to expand its offerings to business customers." Id. at 2. On December 3, 1997, the full Commission accepted the Staff Recommendation and approved the tariff.[13]

Outside of the regulatory process, Ameritech officials publicly cited three reasons for their selection of St. Louis: (1) Ameritech's existing local phone service to 500,000 customers in the Illinois portion of St. Louis on the east side of the Mississippi River; (2) Ameritech's current sales of cellular, paging, and security monitoring services in the St. Louis area; and (3) the paucity of local competition for residential customers served by the incumbent SWBT.[14] Ameritech reportedly planned to market its service by building on its brand name

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13 Application of Ameritech Communications International, Inc. for a Certificate of Local Exchange Service Authority to Provide and/or Resell Basic Local Telecommunications Service and Local Exchange Telecommunications Service, Case No. TA-96-415, *Order Approving Tariff* (Mo.PSC Dec. 3, 1997).

14 See Communications Daily at 1-2, Nov. 7, 1997. See also, Ted Sickinger, *Ameritech to enter Southwestern Bell's Missouri turf*, The Kansas City Star, Nov. 12, 1997 at B8.

awareness in the area and offering customers a single bill for its local, long distance and cellular phone services. Industry analysts anticipated that Ameritech would be able to leverage substantial consumer recognition of its brand name from its existing cellular and alarm monitoring businesses.[15]

Thomas Richards, Ameritech Executive Vice President, was quoted (in separate articles) as promoting the competition plan: "[t]his expansion represents a huge win for consumers . . . ,"[16] and "a tremendous opportunity for Ameritech to grow through competition."[17] Another Ameritech spokesman stated that "[t]he residential market, in our view, is an untapped market."[18]

On the day the Missouri PSC approved its tariff, Ameritech announced that it would next begin the process of testing its interconnection arrangements with SBC. Expressing concern that its brand name not be identified with service inferior "to the standard of excellence that Ameritech's customers are used to," Ameritech announced it would not offer local competition until it was comfortable with SWBT's service.[19] Significantly, the

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15 Reinhardt Krause, *Ameritech is First Baby Bell to Heed Competition's Call*, Investor's Business Daily, Jan. 5, 1998, at A8.

16 Communications Daily at 1, Nov. 7, 1997.

17 Doug Abrahms, *Ameritech Turf Move in St. Louis a First for a Baby Bell*, The Washington Times, Nov. 7, 1997, at B8.

18 Id.

19 Cam Simpson, *Ameritech wins OK to serve St. Louis*, Chicago Sun-Times, Dec. 5, 1997, at 62.

Ameritech-SWBT interconnection agreement was amended as recently as May 19, 1998 to improve its resale terms.

Ameritech attempts to diminish the importance of this competitive potential by arguing that the St. Louis plan was merely a limited attempt by its cellular arm to decrease churn in its wireless customer base. The problems with this "explanation" are multifold. First, while "Project Gateway" is described as a project conceived in early 1997,[20] the public record establishes that Ameritech's application for competitive local operations in Missouri was filed in May of 1996 and even amended in August 1996 -- the year before. Second, Ameritech Cellular is not the certified CLEC in Missouri; from the commencement of proceedings in Missouri and throughout, the certificated entity has been Ameritech Communications International, Inc. As described by Ameritech, this company is a subsidiary of Ameritech Communications Inc., the Section 272 interLATA affiliate created by Ameritech. Ameritech Communications International, Inc. itself apparently provides out-of-region interLATA services. See Ameritech-Michigan 271 Application, Affidavit of Richard E. Shutter (filed May 21, 1997).

These disparities are not mere formalities: Ameritech Communications International, Inc. applied and sought certification from Missouri without any record reference to its cellular business at all. Similarly, the Ameritech entity

20 Affidavit of Paul G. Osland, at ¶ 4 (attached to SBC-Ameritech Application) ("Osland").

offering local service pursuant to an approved tariff is Ameritech Communications International, Inc. The Ameritech entity that enjoys interconnection rights with SBC is Ameritech Communications International, Inc., and as already explained, the interconnection agreement extends well beyond resale rights. Further, at no time apparent from the public record did Ameritech ever suggest to the state regulators that it was only interested in local resale as a bundled offering adjunct to another affiliate's wireless business. To the contrary, it represented, as it must do so under state law, that it would offer local telephone service "as a separate and distinct service."[21] And while Ameritech now states that the "proposed offering never assumed any material impact on residential customers who did not want wireless service as part of the bundl[e],"[22] the Ameritech public statements at the time flatly contradict this ("this expansion represents a huge win for consumers;"[23] "a tremendous opportunity for Ameritech to grow through competition."[24] "[t]he residential market, in our view, is an untapped market").[25] And Ameritech's local service tariff reflects no bundling or price

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21 Application of Ameritech Communications International, Inc., for a Certificate of Local Exchange Service Authority to Provide and/or Resell Basic Local Telecommunications Service and Local Exchange Telecommunications Service, Case No. TA-96-415, *Report and Order* (Mo.PSC Feb. 28, 1997).

22 Osland at ¶ 7.

23 Communications Daily at 1, Nov. 7, 1997.

24 Doug Abrahms, *Ameritech Turf Move in St. Louis a First for a Baby Bell*, The Washington Times, Nov. 7, 1997, at B8.

25 Id.

breaks for this service as customers subscribe to additional services of ACI or any of its affiliates.

Perhaps most telling is Ameritech's explanation as to why the initiative has been put on hold. First, it concedes that "merger related concerns" account for some part of this.[26] Second, Ameritech expressly states that its project "was hindered somewhat by order processing errors." [27] It also explains that the project was cut back from its initial conception as a business and residential offering due to "issues with system interfaces and development. . . ."[28] In other words, SBC's own faulty interconnection provisioning inhibited the attempt by Ameritech to compete in St. Louis.

The application's rationalization of Ameritech's entry into St. Louis stands in sharp contrast with Ameritech's earlier public statements as well as its representations to state government officials over the last two and a half years. This marked disconnect alone warrants not only significant conclusions regarding the anticompetitive consequences of the proposed transaction but also raises serious questions as to the applicants' candor. In either event, it disqualifies the application from being granted.

Moreover, the public record indicates that Ameritech had not limited its entry plans into SBC's region to the state of

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26 Osland at ¶ 11.

27 Id. at ¶ 8.

28 Id. at ¶ 6.

Missouri alone. During 1997 and 1998, Ameritech sought and obtained certifications to provide local exchange services in California and Texas. It negotiated and gained approval for interconnection agreements with SBC in these states.[29] Ameritech sought and was granted certification to provide local exchange service, basic local telecommunications service, and switched access service in Texas on both a resale and a facilities-basis.[30] In California, Ameritech sought and was granted authority to resell local exchange service. Importantly, in its application for California, Ameritech included an attachment which "sets forth a forecast of the number of customers expected after [Ameritech's] first and fifth years of operations as a [CLEC]."[31] Ameritech requested, and was granted, confidential protection of the information in the attachment for one year due

29 See Application of Ameritech Communications International, Inc. for a Service Provider Certificate of Operating Authority, Texas PUC Dkt No. 16965, *Order* (Apr. 2, 1997) ("Texas Certification Order"); Application of Ameritech Communications International, Inc. and Southwestern Bell Telephone Company for Approval of Interconnection Agreement Under PURA and the Telecommunications Act of 1996, Texas PUC Dkt No. 17782, *Order* (Nov. 6, 1997); Application of Ameritech Communications International, Inc. for a Certificate of Public Convenience and Necessity to Offer Local Telecommunications Service to the Public in the State of California, California PUC Decision 97-06-087, *Opinion* (June 25, 1997) ("California Certification Opinion"); Request for Approval of Interconnection Agreement Between Pacific Bell and Ameritech Communications International, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996, California PUC *Resolution* T-16131 (Mar. 12, 1998).

30 See Texas Certification Order at 5.

31 See California Certification Opinion at 3.

to the competitively sensitive nature of the material.[32] Underscoring the competitive potential that this merger would abandon, Ameritech last month renewed its request for confidential treatment of the data.[33] Plainly, public access to the data would inform any analysis of the planned entry of Ameritech into California. In any event, it is clear that some loss of competition will occur in major areas of commerce and population in Missouri, California and Texas, if the merger is allowed.

There is also some indication that SBC may have planned entry into Ameritech's territory. In the context of the SBC-Pacific Telesis merger, SBC's witness Richard J. Gilbert explained the company's out-of-region strategy:

> Thus, SBC is considering providing local exchange service in competition with Ameritech in the Chicago area, where SBC has a significant cellular presence, and in competition with Bell Atlantic in the Washington/Baltimore area, where SBC has both a significant cellular presence and two cable television systems. SBC also has cellular assets in upstate New York where it has been certified as a local exchange competitor and plans to compete with Rochester Telephone. In each of those areas, SBC has network facilities, including an infrastructure of customer support personnel, hundreds of thousands of existing customers, and name recognition through the Cellular One brand.[34]

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32 See id. at 3 (confidential treatment ending June 25, 1997).

33 See Motion of Ameritech Communications International, Inc. to Continue G.O. 66-C Treatment of Exhibit C to its Applications Under Seal, App. No. 97-02-010, filed with California Public Utilities Comm'n at 1 (Sept. 10, 1998) ("[D]isclosure of this information would require it to reveal highly valuable commercial information which Ameritech considers confidential, proprietary and a trade secret.")

34 Report of Richard J. Gilbert, "*Response to Opponents' Comments Concerning the Proposed Pacific Telesis - SBC Merger,*" at 7-8 (Aug. 7, 1996) (citations omitted) (attached

It appears, then, that the proposed merger may eliminate competition in multiple locations in both regions on these facts alone. And as discussed in the following sections, there is further reason to believe that the unambiguous consequence of allowing the merger will be to further entrench local telephone monopolies throughout the country.

III. The Increase in Local Markets Controlled by the Merged Entity Would Have Significant Anticompetitive Effects in Local, Long Distance and New Services Markets.

Increasing the number of local markets within SBC's control would give it an increased ability and incentive to disadvantage rivals by discriminating in interconnection or refusing to deal altogether. *This incentive and ability are heightened beyond those already held by SBC and Ameritech separately.* The full analysis supporting this conclusion is set forth in the attached Declaration of Dr. Michael Katz and Dr. Steven C. Salop, "Using a Big Footprint to Step on Competition: Exclusionary Behavior and the SBC-Ameritech Merger," October 14, 1998, Attachment B. As explained, the merger would have serious anticompetitive effects on new entrants into local telephony, would adversely affect competition between the RBOCs and IXCs both in anticipation of and when the RBOCs are free to enter long distance markets, and will delay and potentially foreclose new innovative services and/or combinations of services which threaten the BOC monopoly.

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to Joint Opposition of SBC Communications Inc. and Pacific Telesis Group to Petitions to Deny and Reply to Comments, (filed in FCC Report No. LB-96-32, Aug. 9, 1996).

A. Anticompetitive Effects on Local Markets.

Drs. Katz and Salop explain that RBOCs enjoy monopoly control over interconnection and access services -- the inputs necessary for the provision of numerous downstream services, including local exchange, long distance and new services. The RBOCs can exploit their monopoly power, that is, maximize profits, either by raising the price of interconnection charged to rivals or by impairing their access to essential inputs. Because interconnection prices are subject to regulatory oversight, non-price exclusionary behavior is more readily available to ILECs and far more difficult to regulate and correct. As explained by Drs. Katz and Salop, a discriminatory interconnection policy will be profitable for an ILEC so long as its gains in the downstream retail market exceeds whatever revenues it foregoes from wholesale interconnection with rivals.

In each local market, SBC and Ameritech have the ability to exercise monopoly power over essential inputs in order to deter new entry. This is of course the fundamental insight of the 1996 Act, and its imposition of numerous obligations upon incumbent telephone companies to provide the necessary inputs on a commercially viable basis. As a matter of legislative finding, then, competitors in local markets are especially vulnerable to discrimination by the incumbent monopolies.[35]

[35] It should be noted that the RBOCs will retain considerable monopoly power even when the Section 271 standards are met for entering long distance markets.

However, discriminatory conduct is especially difficult to regulate since the availability of many of the needed inputs for local telephony interconnection is still uncertain. In some cases, this uncertainty flows directly from litigation brought by SBC, Ameritech and other RBOCs. In other cases, such as OSS, complete standards and interfaces have either not been implemented or even designed and agreed upon by the industry. Performance measures that would monitor discriminatory provisioning are similarly not in place. Access to other necessary inputs (UNEs, etc.) is also in doubt because of restrictions placed on such access by the RBOCs. See generally Affidavit of Kevin E. Brauer, October 12, 1998, Attachment E ("Brauer"). All of these factors point to the ability of SBC and Ameritech to "deny, delay or degrade" access, as Drs. Katz and Salop explain. For the reasons explained in detail in their paper, briefly summarized below, the merger creates additional incentives for the parties to act on this ability.

Discrimination practiced in one local market creates effects in other local markets. When an RBOC currently engages in discrimination, it will not be able to capture the full benefits of its discrimination because its misconduct raises its rivals' costs both inside and outside its region. Especially for potential entrants planning to enter at a sufficiently large scale as to include numerous major markets, i.e., national CLECs such as major IXCs, the discrimination practiced in one region or one local market may impair its national or multi-regional plans.[36]

These spillover effects are heightened where, for example, CLEC entry entails common research, product development and marketing costs that must be covered by the sum of the CLEC's market-specific profits. Because these conditions hold for large scale CLECs, RBOC discrimination in one region against such firms reduces their profitability and thus the likelihood of entry in all regions.

Discrimination practiced by one RBOC in one market therefore creates anticompetitive spillover benefits for other RBOCs controlling other local markets. The merger allows for this externality to become internalized, since it increases the number of local markets under the control of the merged entity. Thus, the larger the RBOC "investing" in discrimination the more fully it is able to appropriate the gains from its "investment." In doing so, the merger increases the rewards of discrimination and thus makes it more certain to be practiced.[37]

The seminal Supreme Court case on monopoly leveraging fifty years ago specifically alluded to the dangers of increasing the

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36 The Application itself insists that the minimum efficient scale for local entry is extraordinary. While Sprint does not subscribe to the conclusions that SBC and Ameritech have drawn, it does agree that scale entry is important for viable entry. See also *Bell Atlantic-NYNEX,* at ¶¶ 82-88.

37 Further, signals sent in one market "educate" in other markets as well. See III Areeda & Hovenkamp, Antitrust Law ¶ 727g (1996).

number of local monopolies held by a firm bent on leveraging its power:

> A man with a monopoly of theaters in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a town where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.

United States v. Griffith, 334 U.S. 100, 107 (1948) (Douglas, J.)(emphasis added).

B. Anticompetitive Effects on Interexchange Markets

A very similar analysis yields the conclusion that the merger would also produce anticompetitive effects in long distance markets once these companies gain Section 271 authority. Again, as Drs. Katz and Salop demonstrate, the incentive and ability to discriminate in the provision of access to IXCs exist pre-merger, and they worsen with the merger.

As long as SBC and Ameritech succeed in maintaining their dominance in their local markets, "they have the power to technically discriminate in favor of their own competitive long-distance operations." Affidavit of Dale N. Hatfield, Ex.H to Comments of MCI Communications Corp. (filed in FCC CC Dkt. No. 97-137, Application of Ameritech Michigan Pursuant to Section 271 to Provide In-region, InterLATA services in Michigan)("Hatfield Aff."). Mr. Hatfield, now Chief, Office of Engineering and Technology, has explained that recent developments in local networks have in fact increased the risk of technical discrimination. The development and deployment of intelligent (software driven) networks, in conjunction with the demand for multimedia applications, materially changes the environment from the traditional, standardized voice and data interconnections to a substantially more dynamic and changing environment in which individual customers and carriers can be given customized arrangements to enable either more efficient use of traditional services and/or new services. This complexity, while making new services possible, also gives the RBOCs new opportunities to favor their own operations.

The merger would exacerbate this ability to discriminate. With the merger, the amount of traffic that would originate and terminate in-region, i.e., in the considerably increased region of the new SBC-Ameritech, would substantially increase. Sprint estimates that the new firm would terminate 45% of minutes that it controls on the originating end. This represents a substantial increase in the number of minutes Ameritech alone controls at both ends today: 30% of all minutes originating in Ameritech's territory also terminate there. Thus, Ameritech would increase the number of minutes it controls at both ends by 50%, from 30% to 45%.

The fact that considerably more traffic will become 'in-region' for both ends of the call means that the merged RBOC can raise its long distance rivals' costs at both ends of more calls. The merger also increases the incentives to discriminate because the merged entity is able to secure a larger share of the benefits of discrimination than either RBOC can secure separately. The merger, by internalizing the payoff (the anticompetitive spillover benefits), makes discrimination more profitable and thus more likely.

C. Anticompetitive Effects on New Services

Again, a comparable analysis holds for new services and/or combinations of services. The Commission must fully consider the ways in which these new service providers (or combined service providers, or "CSCs") are put at risk by the increased incentives and opportunities for discrimination: service innovation is a stated priority of this Commission.[38] As discussed above, technical advancements to local exchange networks make possible and desirable customized access and interconnection arrangements. Competitors' needs to acquire ILEC inputs in nontraditional forms or in new price configurations gives the ILECs an improved opportunity for denial and delay notwithstanding the most vigilant regulatory oversight.

As carriers search for new, innovative ways to exploit technology to give customers service improvements, they will require access to new and additional capabilities in the local exchange network. In Sprint's case, there is no better example of this than Sprint ION, or Integrated On-Demand Network. In order to bring this new and desired set of services fully to

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38 See Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Docket 98-146, *Notice of Inquiry* (rel. Aug. 7, 1998); Inquiry Concerning the Deployment of Advanced Telecommunications Capability, *Notice of Proposed Rulemaking*, CC Dkt. 98-146 (rel. Aug. 7, 1998).

market, Sprint will need modifications to standard access and interconnection arrangements. See Brauer Aff. (*passim*).

And as Mr. Hatfield explained in the FCC's Michigan 271 proceeding, Ameritech and other BOCs can discriminate against competitors or potential competitors in such cases through outright refusals of appropriate interconnection arrangements or by slowrolling competitors. "The ability to refuse or delay such requests puts Ameritech in the position of controlling the development of new and competitive services, both as to whether the new service is created at all, or more subtly, when it comes to market and who can provide it." Hatfield Aff. at 21.

The combination of SBC and Ameritech would increase these RBOCs' incentives to fail to cooperate for new services like ION, because, like the effects in local and long distance, the combined entity's presence in a very large number of markets means that the rewards of discrimination in one market are more fully captured in the larger region. The mechanisms that create the spillovers here and thus the increased incentive to discriminate are discussed in full in Katz and Salop. Especially given services such as ION, which are in essence a network of services the value of which rises as more and more customers are added to the network, discrimination in one market will ripple throughout other markets. Where a service offers increased value to subscribers for on-net communications, exclusionary conduct that reduces the number of subscribers in one region reduces the value of the service in other regions. Also, reductions in incremental net revenues from discrimination suffered by a CSC in one region will reduce the overall incremental net revenues available to that CLEC, making it difficult to cover investments necessary to serve new areas. Again, the payoff to the RBOCs from exclusionary behavior is materially greater post-merger. See Katz and Salop at ¶ 34-54; Affidavit of Gene Agee, Attachment F.

As described by Drs. Katz and Salop, discrimination is more certain if the merger is allowed because of the additional problems it poses for regulators to monitor and detect misconduct. As explained in full by Drs. Farrell and Mitchell, by reducing the number of benchmarks by which performance can be measured, the merger significantly enhances the ability of all RBOCs (and GTE) to act in anticompetitive ways without successful regulatory interdiction.

D. The Commission Should Deny the Application on the Basis of These Adverse Vertical Effects.

The preceding sections demonstrate that the competitive consequences of the merger are unambiguously negative. As shown, the vertical effects in the local, long distance, and new services markets are anticompetitive because the merger increases the incentive and the ability of the firms to exploit their monopoly power over interconnection and access services necessary to the provision of those downstream services.

These consequences plainly warrant the conclusion that the merger is contrary to the public interest. The Commission has repeatedly reviewed transactions for their vertical effects, including the likelihood of increasing incentives to raise rivals' costs through price and non-price discrimination. See, e.g., Merger of MCI Communications Corp. and British Telecommunications plc, GN Dkt. No. 96-245, *Memorandum Opinion and Order,* 12 FCC Rcd 15351, 15412 (1997) ("we are concerned whether the merger...will increase the ability or the incentive of the vertically integrated firm to affect competition adversely in any downstream end-user market"); Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended, ISP-95-002, *Declaratory Ruling and Order,* 11 FCC Rcd 1850, at ¶¶ 58-60 (1996). In the specific context of its review of prior RBOC mergers, the Commission has expressly stated its concern not only for the market power and possible misconduct that characterize the RBOCs pre-merger, but also "the incremental increase in that power or misconduct that will result from the proposed transfer." Applications of Pacific Telesis Group and SBC Communications, For Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, Report No. LB-96-32, *Memorandum Opinion and Order,* 12 FCC Rcd 2624 at ¶ 42 (1997); see *Bell Atlantic-NYNEX,* at ¶ 120 (1997) (rejecting argument made by opponents because they had not shown how the merger would "increase applicants' incentive or ability to engage in non-price discrimination"). Here, the showing has been plainly made; both the incentive and the ability to engage in anticompetitive conduct worsen with the merger.

The Commission has plenary authority over questions of industry structure. The Commission's statutory mandate extends well beyond merely correcting bad conduct; it obligates the FCC to affirmatively act to assure efficient industry structures which themselves will aid to minimize such conduct. On numerous occasions, reviewing courts have upheld the FCC's use of its broad authority to prescribe a particular industry structure in order to achieve perceived benefits or to avoid potential problems.

The FCC's initial Computer Inquiry proceeding provides a clear example of such action. In Computer I, the FCC promulgated regulations which required common carriers to provide non-regulated data services through a structurally separate corporate entity. The Second Circuit upheld the FCC's authority to regulate common carrier entry into the unregulated field of data processing services.

> The burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices and hence regulation is justified under its broad rule-making authority.[39]

In so doing, the Court rejected petitioners' attempts to narrow the FCC's authority.

> It is irrelevant that the [separation] rule is aimed at potential rather than actual domination or restraints, or that the Commission is not certain that the developments forecast will occur if the rule is not enacted.[40]

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39 GTE Service Corp. v. FCC, 474 F.2d 724, 730 (2d Cir. 1973).

40 Id. at 731 (citation omitted). In Computer II, the Commission required AT&T to provide data services through a separate subsidiary and once again the appellate court deferred to the Commission's determination of the appropriate industry structure. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

The FCC's authority over the structure of the industries it regulates extends to outright proscription of certain entities participating in some markets. The FCC's cable-telephone cross-ownership rules promulgated in 1970 and eventually removed by Congress after the rules had served their purpose are a prime example of this.[41] In reviewing the agency's initial decision, the Fifth Circuit explained the Commission's broad authority under the Communications Act, specifically relying upon sections 151, 152(a) and 214.

> The Commission is obliged to discharge its responsibilities in this area as best it can and it has chosen in this instance to implement the national policy by limiting the involvement of common carriers, over which the Commission has unquestioned jurisdiction, in CATV operations. . . . Although [the FCC] *does not yet know how broadband cable services will or should develop, it is unwilling at this point to allow the telephone companies to pre-empt the field simply by virtue of their control over means. . . . [T]he elimination of this danger is consistent with the Commission's broad duties under the Communications Act.*[42]

These cases demonstrate the prophylactic nature of the FCC's powers over industries it regulates. Plainly the FCC has the authority -- indeed the obligation -- to consider transactions in light of whether they promote efficient market structures. It

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41 These rules were ultimately codified by Congress, and subject to constitutional challenges. See Chesapeake and Potomac Telephone Co. of Va. v. United States, 42 F.3d 181 (4th Cir. 1994), cert. granted 115 S.Ct. 208 (June 2, 1995), remanded (Feb. 27, 1996). The litigation was mooted by the amendments made by the Telecommunications Act of 1996.

42 General Tel. Co. of the Southwest v. FCC, 449 F.2d 846, 854-857 (5th Cir. 1971) (emphasis added) (citation omitted).

need not and must not acquiesce in proposals that force it to await the inevitable inefficient outcomes and search for second-best, after-the-fact remedies.

IV. The Merger Will Diminish the Effectiveness of Regulation by Reducing the Number of Available Benchmarks

The declining number of large incumbent LECs will adversely affect the FCC's:

> ability to carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation.... As diversity among carriers declines, both this Commission and state commissions may lose the ability to compare performance between similar carriers that have made different management or strategic choices. Because we approve this merger with conditions, thereby reducing the number of independently controlled large incumbent LECs, future applicants bear an additional burden in establishing that a proposed merge will, on balance be pro-competitive and therefor serve the public interest, convenience and necessity.

Bell Atlantic-NYNEX, at ¶ 16. These recent Commission observations have a long tradition -- one stemming from the divestiture and formation of seven RBOCs. As the Court of Appeals for the D.C. Circuit noted:

> There is a lot of evidence that the break-up and other recent developments have enhanced regulatory capability.... [T]he existence of seven [R]BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing.... Indeed, federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements ... and in comparing installation and maintenance practices for customer premises equipment.

United States v. Western Electric Co., 993 F.2d 1572, 1580 (D.C. Cir.), cert. denied 510 U.S. 984 (1993).

The regulatory utility of benchmarks has only increased over this period, as explicated in detail in the attached paper of Drs. Joseph Farrell and Bridger Mitchell, "Benchmarking and the Effects of ILEC Mergers." As they explain, benchmarking is a very valuable tool. The Commission's regulatory responsibilities require it to reach complex decisions regarding the pricing of monopoly services or inputs (e.g., interstate access) and the quality of access or interconnection with such services and inputs (e.g., access to UNEs). The FCC's ability to confidently assess proposals by regulated monopolies is greatly impaired by the unambiguous asymmetry in information between the regulator and the regulated firms.[43] As explained more fully by Drs. Farrell and Mitchell, benchmark regulation has been used in material ways to ameliorate this fundamental problem. It can also help to diminish the perverse incentives created by regulation itself (the "ratchet effect").

Currently, the Commission's statutory tasks are substantially facilitated by its ability to compare one RBOC's costs and other measures of performance with those of other RBOCs and GTE. The merger will impair the Commission's benchmarking ability and therefore its ability to successfully implement the Act by further reducing the already small number of RBOCs whose

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43 United States v. Western Elec. Co., 900 F.2d 283, 302 (D.C. Cir. 1990) (citing to DOJ for proposition that the risk of cross-subsidization is "significantly mitigate[d]" by FCC regulation -- "especially the availability of benchmarks to enforce effective accounting rules") (citation omitted).

performance can be used to gauge the performance of any particular RBOC (or GTE).

For example, in discussing the use of Automated Reporting Management Information System ("ARMIS") report data to compare service quality and infrastructure data across price cap ILECs, the FCC recited:

> From the inception of the monitoring program, benchmarking has been a primary goal.... [B]enchmarking promotes the Commission's uniform reporting goals and is indispensable in monitoring the impact of price cap regulation on ILEC service quality and infrastructure development.... '[t]he benefit of benchmarking in price cap ILEC monitoring is that the benchmark is as dynamic as the telecommunications industry.'

Quality of Service Standards in LEC Tariffs, CC Dkt. No. 87-313, *Memorandum Opinion & Order*, 12 FCC Rcd 8115 at ¶ 57 (1997) (citations omitted).

The plurality of approaches among large ILECs has been central to the FCC's development of regulations to implement interconnection rules under sections 251 and 252 of the Act. The process by which the Commission established standards for local number portability provides a prime example. While all other major ILECs claimed that the Location Routing Number (LRN) method of implementing local number portability would not be economically feasible,[44] Ameritech conceded the feasibility of

[44] Telephone Number Portability, CC Dkt. No. 95-116, *First Order on Reconsideration* at ¶ 34 (rel. Mar. 6, 1997). The other ILECs had advocated query-on-release. This method would have resulted in lower-quality service on calls to telephone numbers ported to competing local carriers and thus help ILECs to exclude rivals from local service markets.

LRN. The Commission imposed the competitively superior LRN alternative.[45] As Drs. Farrell and Mitchell observe, if Ameritech had joined the other large ILECs in claiming that LRN was impracticable, "it seems unlikely that the Commission would have had the knowledge or confidence to require it, or to do so on the same timetable." Farrell and Mitchell at 15.

The Commission explained in *Bell Atlantic-NYNEX* that the existence of numerous large ILECs allows for differences to arise among the carriers; this results in faster solutions to issues and problems, thereby accelerating competition.[46] For instance, on any particular issue, one ILEC may have different incentives than another; however, when ILECs merge, incentives are aligned to protect the post-merged entity's overall interests.[47] "This may result in the post-merger incumbent LEC cooperating less than the pre-merger incumbent LECs would have in enabling competition to grow."[48] In addition, the remaining comparisons become less meaningful as the disparity in sizes among the RBOCs increases. Once the disparity in size is considered (relevant to some but

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45 Id. at ¶¶ 13, 38.

46 *Bell Atlantic-NYNEX*, at ¶ 154. See also Peter Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry at 3.24, 3.54-3.55* ("Benchmarking one LEC's performance against another in the post-divestiture marketplace has proved an effective regulatory tool. Laggard or eccentric LEC performance stands out when eight large holding companies line up for periodic regulatory inspection").

47 *Bell Atlantic-NYNEX*, at ¶ 154.

48 Id., at ¶ 154.

not all issues), the number of reliable benchmarks becomes effectively even smaller.

Indeed, it was none other than Ameritech -- party to this application -- that filed a lengthy submission with the federal district court in 1987 cataloguing dozens of instances in which the FCC, the Justice Department, and the private sector have successfully compared one RBOC performance against another to the benefit of public policy.[49] Yet now, Ameritech would have the Commission discard this evidence.

The impairment of regulatory effectiveness through the loss of benchmarks is squarely part of the public interest analysis necessary to the application's evaluation. Congress intended for the 1996 Act to promote competition, leading to the deregulation of the telecommunications markets.[50] In light of these goals, the Commission requires applicants to demonstrate that their proposed mergers will affirmatively promote the public interest in both competition and deregulation.[51]

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49 See "Benchmark Comparisons," Attachment A to Ameritech's Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions (Western Elec. Co.), 1987 D.C. Cir. Civ. Action No. 82-0192 (filed Mar. 13, 1987) (attached to Attachment C).

50 Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, at 1 (1996); see also *Bell Atlantic-NYNEX*, at ¶ 145 ("Increased market power would be fundamentally inconsistent with the primary policy goal of the 1996 Act -- the development of competition in, and the deregulation of, telecommunications markets.").

51 Applications of Teleport Communications Group Inc., and AT&T Corp. for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based an Resold Communications Services, *Memorandum Opinion and Order*, CC

Of course, the two goals are related. Actions and industry structure that are procompetitive will generally improve the ability of regulators to move toward deregulation; anticompetitive steps and structure will for the most part increase the need for regulation. This relationship works in the other direction as well; as regulatory effectiveness diminishes, anticompetitive actions by regulated firms are more likely to occur.

As explicated in full by Drs. Farrell and Mitchell, as well as by Drs. Katz and Salop, the decrease in benchmarks will predictably improve RBOCs' ability to discriminate. The merger would thus make it less likely that "best practice" benchmarking will reveal as desirable an outcome, and would increase the zone of tolerance when scrutinizing "worst practices." These effects would thwart competition and injure consumers. On this basis alone, the reduction in benchmarks dictates the conclusion that the merger is contrary to the public interest.

The Commission stated in *Bell Atlantic-NYNEX* that,

> [u]ntil competition develops sufficiently to erode market power and permit deregulation, we will be concerned with the impact of proposed mergers on the effectiveness of this Commission's and state commissions' ability to constrain market power and ensure fair rules for competition. A reduction in the number of separately owned firms engaged in similar businesses will likely reduce this Commission's ability to identify, and therefore, to contain, market power.[52]

Dkt. No. 98-24 at ¶ 12 (1998)("Teleport/AT&T"); see also *Bell Atlantic-NYNEX,* at ¶ 2.

52 *Bell Atlantic-NYNEX,* at ¶ 147. Moreover, the Commission has recognized that without competition, deregulation cannot be accomplished without risking monopoly prices for consumers. See In re Application of Ameritech Michigan Pursuant to

Consequently, the Commission's regulation will be less effective in promoting the arrival of competition in the SBC and Ameritech areas.[53]

The industry structure that would result from this merger, particularly in tandem with the announced Bell Atlantic-GTE merger, would be dramatically different from that considered one year ago in *Bell Atlantic-NYNEX*.[54] At that time, the Commission stated that "further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns."[55] As demonstrated above, the merger of SBC and Ameritech raises critical issues regarding the ability of the Commission and state regulators to effectively regulate SBC post-merger. In light of the BA-GTE proposed merger as well as others since the Bell Atlantic consolidation, even fewer benchmarks will

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Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Dkt. No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd 20543 at ¶ 19 (1997).

53 General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) ("It is settled that practices which present realistic dangers of competitive restraint are a proper consideration for the Commission in determining the 'public interest, convenience, and necessity,' . . . and the elimination of this danger is consistent with the Commission's broad duties under the Communications Act.")(citations omitted); In re Cease and Desist Order Directed Against Video Enterprises, Inc., Holyoke and South Hadley, Mass., 52 FCC 2d 630, 637 (1975) (denying the Commission its right to determine what is in the public interest is inimical to sound effective regulation).

54 See *Bell Atlantic-NYNEX*, at ¶ 155.

55 Id. at ¶ 156.

be available for the Commission and state regulators to restrain SBC's market power. The Commission must take into account these proposed mergers and the number of benchmarks that will remain should these mergers be consummated.

Even if one sets aside the anticompetitive consequences of the loss of benchmarks, the costs of alternative forms of regulation that the Commission would be forced to use in the wake of diminished benchmarks would independently compel the conclusion that the merger is contrary to the public interest. In order to fulfill its regulatory duties, the Commission would have to insist on more intrusive and much costlier regulatory oversight of large ILECs. Absent benchmarking, the Commission would have to investigate directly and at substantial cost the actual motivations and/or results of challenged conduct.

More direct measures to assess the reasonableness of BOC conduct or positions would need to be implemented. Tools such as increased audits, use of document and *in personae* subpoenas to examine internal decisionmaking, and a vastly stepped-up need for after-the-fact complaint adjudication are just some of the inferior alternative tools the FCC would be forced to try. Broad on-the-record hearings to discern anticompetitive conduct from legitimate defenses, reminiscent of the FCC's Docket 19129 of the Bell System, might be necessitated.

The Commission could not of course merely acquiesce in its newfound state of diminished regulatory effectiveness. Just as the Commission cannot regulate where there is no issue to address[56] and just as it must review regulations periodically to ensure that such regulations are still required,[57] so too must the Commission not fail to regulate where such action is demanded in the public interest.[58] Such a failure would be contrary to the general public interest mandates as well as the Act's specific requirements that it ensure just and reasonable rates and practices. It would also violate the 1996 Act's command that the Commission forbear from its statutory and regulatory obligations only where such forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[59]

Plainly, the radically escalated need for direct regulation would be viewed with great disfavor by regulated firms but more importantly taxpayers. The increased regulatory burdens -- keeping in mind that they represent second best solutions in any event -- dictate the conclusion that the merger is contrary to the public interest.

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56 See Home Box Office v. FCC, 567 F.2d 9, 34 (D.C. Cir.), cert. denied 434 U.S. 829 (1977).

57 See Geller v. F.C.C., 610 F.2d 973 (D.C. Cir. 1979)

58 See generally Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Dkt. No. 20828, *Final Decision* 77 FCC 2d 384, 433 (1980) ("Commission regulation must be directed at protecting or promoting a statutory purpose.")

59 47 U.S.C. § 160(b).